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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT OPPOSING JURISDICTION.

CHARLES C. TRABUE,
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INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

REPLY TO APPELLANT'S STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

This suit is by a sub-contractor under a highway contract. The contract was made on March 12, 1928, and at the same time a contract bond was executed in conformity with law, with the National Surety Company as surety.

The contract was completed on July 2, 1930, and the statutory advertisement for claims was made by the Commissioner of Highways for thirty days. The "date for final settlement" was September 3, 1930, and on that date or immediately thereafter, the Commissioner paid over the retainage to the contractor, taking from it a refunding bond, with a different surety company.

The suit was against the contractor, the Commissioner, the contract surety and the refunding surety. The Chancellor held that the Commissioner was discharged by payment of the retainage to the contractor, and taking from him the refunding bonds, but he rendered judgment against the contractor and against both of the sureties.

The National Surety Company, which was the contract surety and on whose behalf this brief is filed, appealed and assigned as error in the Tennessee Court of Appeals the failure of the Chancellor to hold that—

> "The release of the retainage and the delivery of the bond in place of the retainage (that is, the refunding bond) and the delivery of the bond in court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

The Acts of 1917 and 1929.

The above acts are the ones that govern the matter. The Act of 1917 (Chapter 74) provides as follows:

> "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in the amount fixed by the Department. * * * Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days' notice in some newspaper, * * * that settlement is about to be made and notify all claimants to file notice of their claim with the Secretary of the Department.
>
> "The Secretary of the Department shall withhold

> a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

The amendatory Act of 1929 substituted for "a reasonable time" the definite period of "sixty days" in which claimants might institute suit. If suit was brought, the Commissioner was to file a petition in the case and pay the retainage into court.

Upon this being done both the Commissioner and the contract surety were to stand discharged. The language was as follows (Tennessee Code, Sec. 3222d):

> "Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition accompanied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sums so paid into court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

But the legislature felt that the delay of sixty days, and, if suit was brought, the indefinitely longer delay, might be unfair and embarrassing to the contractor. It was accordingly provided in the Act of 1929 that the contractor could take over the retainage at once upon executing a refunding bond, viz. (Code, Sec. 3222b):

> "On the date set for full and final settlement with the contractor the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums (to be) held for the said period of sixty days, such bond to be approved by the Commissioner, whereupon the Commissioner of the Depart-

ment of Highways and Public Works shall pay such contractor in full."

The payment by the Commissioner to the contractor in the instant case was made at the time and in exact conformity with the above provision. The refunding bond taken by the Commissioner recited:

> "This obligation is executed under the provisions of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department."

Appellant brought suit on the refunding bond executed under authority of the Act of 1929, affirmed the validity of said Act, and the Chancellor rendered a judgment in favor of appellant on said bond. The appellant endeavored to take benefits under said Act in the lower court and in the Court of Appeals, and later, in the Supreme Court, sought to reverse its position and attack its validity.

The Tennessee Court of Appeals ruled—contrary to the theory and contention of both parties—that the Act of 1929 was not applicable and that the payment of the retainage by the Commissioner was therefore wrongful, and that this wrongful act of his released the contract surety.

While the effect was to discharge the contract surety, this ruling contradicted its contention, which was that the Act of 1929 was applicable and that the payment of this retainage on a refunding bond was specifically authorized

by the Act and was rightful; and on that account the contract surety filed its petition for certiorari.

Appellant also filed its petition for certiorari and argued the "dual bond" cases. This was the first time they were brought into the suit. The argument was that while the payment over of the retainage might discharge the contract surety's liability to the State (one obligee), it was a legal wrong to the materialmen (the other obligee), and accordingly that the surety remained bound to them.

Appellant had sued and recovered on the refunding bond given under the Act of 1929, and it could not very well get away from that Act, and in its petition (pp. 22, 23), it argued that the payment was wrongful whether the Act of 1929 was applicable or not.

This argument was contradictory on its face, for if the Act of 1929 was applicable at all it was completely applicable. The payment of the retainage on a refunding bond in such case was rightful and not wrongful and was equally binding on all parties concerned.

But how could it be said that the payment of the retainage and the taking of a refunding bond was "unauthorized" if the Act of 1929, which specifically authorized this to be done, was applicable?

And so finally appellant in its last pleading—its answer to our petition for certiorari in the Tennessee Supreme Court—was forced to take the position that the Act of 1929 could not lawfully be applicable to this controversy.

But this last position of appellant is, as we have explained, untenable. There is, we think, no constitutional reason why the Act of 1929 should not apply. And, aside from that, appellant comes with this too late, for it has sued and recovered below on the refunding bond taken under the Act of 1929 upon the very ground and averment that it was taken "as provided by law."

The Appellant is Estopped Now to Question the Validity of Chapter 80 of the 1929 Public Acts of Tennessee.

This suit was predicated on the Act of 1929. The bill averred as follows:

> "Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as provided by law, with the defendant, Equitable Casualty & Surety Company, as surety thereon, in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways and Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit of claimants who had filed their claims with said Department of Highways and Public Works."

In the course of the trial below complainant asked to amend its bill so as to pray that the Commissioner of Highways be required to pay the retainage into court. But the court specifically denied the application on the ground that complainant had sued on the refunding bond and had averred that it had been taken pursuant to law. In denying this application the court said (decree of October 25, 1932):

> "The complainant in its original bill alleged in substance that the refunding bond for the retainage was executed 'as provided by law' and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and prayed for a decree against the principal and the surety on the

refunding bond for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into court by the Commissioner of Highways and Public Works * * *.

"Where it is alleged that the bond was taken as provided by law and the complainant has brought action thereon against the principal and surety, it cannot, after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and Public Works to pay the retainage into court. The amendment is inconsistent and repugnant to the original bill and the application to amend the original bill as proposed, is denied."

There was no exception taken to this ruling and no effort made to review it in the appellate courts.

Appellant's contention throughout was that the payment of the money and taking of the refunding bond were authorized—in other words, that the Act of 1929 applied. But the insistence in this proposed amendment was that notwithstanding the valid paying over of the money on a refunding bond, the Commissioner continued to be responsible and could be required to pay the money into court.

Appellant asked for and obtained judgment below on the refunding bond, on the ground that it was taken "as provided by law"—that is, by authority of the Act of 1929.

Accordingly, as the Chancellor ruled, appellant cannot be heard now to say that the Act of 1929 did not apply. The principle is well settled that—

"An individual has no right to complain that a statute is unconstitutional after he has endeavored to take benefits under it to the injury of others."

The above language from Black on Constitutional Law was quoted with approval in *Collier* v. *Montgomery County*, 103 Tenn. 714, and in *Saylor* v. *Trotter*, 148 Tenn. 370.

So in *Roberts* v. *Roane County,* 160 Tenn. 124, the court approved the following language from Cooley on Constitutional Limitations:

> "There are cases when a law in its application to particular facts must be sustained, because the party who makes objection has by prior acts precluded himself from being heard against it; and when a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive protection and to consent to such action as would be invalid if taken against his will."

12 C. J., 769:

> "Thus a person who has participated in proceedings under a statute, or who has acted under a statute in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality."

And so 6 R. C. L., Constitutional Law, p. 95:

> "The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality. * * * A party may waive his right to question the constitutionality of a statute by proceeding under it. * * * The constitutionality of a statute cannot be raised for the first time in an appellate court."

Appellant averred the applicability of the Act of 1929 by bringing suit on the refunding bond as a bond executed "pursuant to law" and obtaining judgment on that bond, and it will not be permitted at this late day and for the first time to change the whole complexion of its suit by denying the applicability of that Act.

> "A person may, by his acts or omission to act, waive a right which he might otherwise have under the Con-

stitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one."

Eustis v. *Bolles,* 150 U. S. 361.
Rutland R. Co. v. *Central Vermont R. Co.,* 159 U. S. 630.

Chapter 80 of the 1929 Public Acts of Tennessee Merely Alters the Remedy—It Does Not Impair a Contract Right.

The provision of the Act of 1929 complained of is that which allows the payment by the Commissioner to the contractor of the retainage upon taking a refunding bond.

But the whole procedure was statutory. The bond was not a matter of private contract between the materialmen and the surety. They had no right to select the surety but only the right to have a "proper bond," and one "proper bond" is in the law the same as another.

In *Campbell* v. *Cresap,* 166 Tenn. 75, the court said:

"Ordinarily a refunding bond executed by a surety qualified to do business in Tennessee affords abundant protection to unpaid claimants for labor and materials furnished. Corporate sureties are subjected to rigid requirements as a condition of permission to transact business in this State. It is quite exceptional for one of such institutions to turn out insolvent."

There was, therefore, nothing in this provision for substituting a refunding bond that would impair the obligation of the existing contract.

An Act that subjected to garnishment the wages and salaries of public employees was held not unconstitutional as impairing the obligation of a contract, in *Cavender* v. *Hewitt,* 145 Tenn. 479. The court quoted the following with approval:

> "There can in the nature of things be no vested right in an existing law which precludes its change or repeal. In no case is there implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law. * * * It is entirely competent for a legislature to alter, enlarge, modify, or confer a remedy for existing legal rights."

The 1929 Act improved the situation of the claimant. Under the 1917 Act the Commissioner, after what he conconsidered "a reasonable time," could pay the money to the contractor and discharge both himself and the surety. These conditions were insecure and precarious for a claimant. The 1929 Act was to improve these conditions. Under the later Act the claimant was assured that during sixty days the money could not be paid out by the Commissioner except either (a) into court or (b) to the contractor on taking a refunding bond.

The Supreme Court of Tennessee in its opinion in the present case, among other things, said:

> "The Act of 1929 declared that its provisions should 'take effect from and after its passage.' That is, the procedure outlined should be thereafter followed. The Act dealt with procedure to be followed upon the completion of all highway contracts, irrespective of the date of any contract. Nothing to the contrary can be gathered from any portion of the amendatory statute.
>
> "Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent.
>
> "It is the general rule that, where a statute deals with procedure only, it applies *prima facie* to rights of action that have accrued and indeed to pending actions. Lewis' Sutherland Statutory Construction, Second Edition, Vol. 2, p. 1226, 25 R. C. L. 791, 59 C. J. 1173.

"The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective remedy instead. This is true even though the new remedy is not so convenient.

"The Supreme Court of the United States has announced the same rule. *Tennessee* v. *Sneed,* 96 U. S. 69; *Fourth National Bank* v. *Francklyn,* 120 U. S. 764.

"By the Act of 1917 complainant Steel Company was given recourse on the retainage and on the contract bond to secure its rights arising under its engagement with the general contractor. For these remedies the Act of 1929 substituted recourse on an indemnity or refunding bond.

"It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owners. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.

"Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commissioner. The protection offered by one bond would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken.

"Owing to the economic stress of recent years, the surety company executing the contract bond and the surety company executing the refunding bond both became involved in financial difficulties. For that reason the complainant Steel Company is here seeking to hold both surety companies.

"In our opinion, for the reasons heretofore stated, the surety on the contract bond has been discharged

from liability and the decree of the Court of Appeals is accordingly affirmed."

A State legislature may alter the remedy to enforce a contract without impairing its obligation, provided an effectual remedy is left for its enforcement.

Tennessee v. *Sneed,* 96 U. S. 69.

Fourth National Bank v. *Francklyn,* 120 U. S. 764.

Respectfully submitted,

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(6647-C)